88-1453

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JOHN E. GRAHAM & SONS, ET AL.,
Petitioners,

VERSUS

JERRY A. LANDRY, ETC., ET UX,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

JAMES HANEMANN, JR.
Hanemann & Associates
1010 Whitney Bank Building
New Orleans, LA 70112
Phone: (504) 522-6737

Attorneys for
Defendants-Petitioners
Ranger Insurance Company
Highlands Insurance Company
New York Marine Managers, Inc.

WALTER W. CHRISTY
Kullman, Inman, Bee & Downing
615 Howard Avenue
New Orleans, LA 70130
Phone: (504) 524-4162

Attorneys for
Defendants-Petitioners
John E. Graham & Sons

MAT M. GRAY
Faris, Ellis, Cutrone & Gilmore
1207 Whitney Bank Building
New Orleans, LA 70130-2657
Phone: (504) 581-6373

Attorneys for Dennis Edward Jennings as nominee for certain Underwriters at Lloyds, London and certain companies of the Institute of London Underwriters

W. GERALD GAUDET
Voorhies & Labbe'
700 St. John Street
Lafayette, LA 70501
Phone: (318) 232-9700

Attorneys for
Defendants-Petitioners
John E. Graham and Sons
Highlands Insurance Company
Americas Insurance Company
Citadel Insurance Company
Certain Underwriters at Lloyds, London and Institute Companies

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

Petitioners submit that their application for a Writ of Certiorari to the Supreme Court of Louisiana presents the following questions for review:

I.

Whether the definition of who is a "member of a crew of any vessel" as adopted by the courts of the State of Louisiana and the United States Court of Appeals for the Fifth Circuit is in conflict with the decisions of this Court and other Circuit Courts of Appeal.

II.

Should the test for seaman status under the Jones Act, 46 U.S.C. § 688, include as a requirement that the employee must be on board to assist in navigational (transportation) function of the vessel?

LIST OF PARTIES

The following are the parties to this proceeding in the Supreme Court of Louisiana:

Jerry A. Landry, Plaintiff-Appellee

Elizabeth Hebert Landry, Plaintiff-Appellee

John E. Graham and Sons, Defendants-Appellants

Highlands Insurance Company, Defendant-Appellant

Americas Insurance Company, Defendant-Appellant

Citadel Insurance Company, Defendant-Appellant

Ranger Insurance Company, Defendant-Appellant

New York Marine Managers, Inc., Defendant-Appellant

Certain Underwriters at Lloyds, London and Institute Companies, Defendants-Appellants

Dennis Edward Jennings as nominee for Certain Underwriters at Lloyds, London and certain companies of the Institute of London Underwriters, Defendant-Appellant

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DECISIONS BELOW

The opinions of the Court of Appeal, First Circuit, State of Louisiana, are reported under the title of *Landry v. John E. Graham and Sons, et al* at 506 So.2d 843 (La.App. 1st Cir. 1987), and under the title of *Landry v. John E. Graham & Sons, Inc.* at 525 So.2d 276 (La. App. 1st Cir. 1988). The writ denial by the Supreme Court of Louisiana is reported at 534 So.2d 431 (La. 1988).

The unreported Reasons for Ruling of October 3, 1986, issued by the Sixteenth Judicial District Court, Parish of St. Mary, State of Louisiana, Judgment of November 3, 1986 and denial of application for new trial of December 18, 1986, by the same Court, are attached hereto as appendices.

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JURISDICTION

On October 3, 1986, the trial judge in this matter, the Honorable C. Thomas Bienvenu, Judge of the 16th Judicial District Court, Parish of St. Mary, State of Louisiana, took two actions: (1) he denied Petitioners' Motion for Summary Judgment on the issue of Plaintiff's seaman status (2) he granted Plaintiff's Motion for Summary Judgment, holding that, as a matter of law, Plaintiff was a seaman as that term is used in the Jones Act, 46 U.S.C. 688.

Formal judgment, embodying those two actions, was rendered November 3, 1986, and the application for new trial filed by Petitioners was denied.

From that action, Petitioners, utilizing the procedural vehicles authorized by the Code of Civil Procedure of the State of Louisiana, took two actions: (1) from the judgment denying the Motion of Petitioners an application for supervisory writs was prepared and filed; (2) from the judgment granting the Motion of Plaintiff an appeal was prepared and lodged.

On March 20, 1987, the Court of Appeal, First Circuit, State of Louisiana, denied the writ application of Petitioners stating that all issues raised therein could be disposed of within the appeal.

On April 19, 1988, the Court of Appeal, First Circuit, affirmed in all respects the action of the trial court below.

On September 6, 1988, on limited rehearing, the Court of Appeal, First Circuit, maintained its denial of Petitioners' Motion for Summary Judgment but, on purely procedural grounds, vacated their earlier judgment, reversed the grant of summary judgment in favor of Plaintiff and remanded the entire matter to the District Court for trial.

Subsequently, Petitioners filed a Petition for Certiorari in the Supreme Court of Louisiana asking for relief, primarily from the denial of the writs requested by Petitioners, and asking the Supreme Court of Louisiana to consider the failure of the courts below, to render judgment in their favor dismissing the demands against them. This Petition was denied by the Supreme Court of Louisiana on November 28, 1988 and, accordingly, Petitioners have applied to this Honorable Court for writs. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a) since the Supreme Court of Louisiana has entered a final judgment

denying Petitioners' Petition for Certiorari with respect to the judgment entered by the Court of Appeal on April 19, 1988, affirming the judgment of the court below that Petitioners' were not entitled, as a matter of law, to a judgment holding Plaintiff to be a non-seaman.

—o—

STATUTES INVOLVED

This petition raises issues under the Jones Act, 46 U.S.C. § 688, and the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50.

This petition specifically raises issues under the following provisions of the Jones Act:

Recovery for Injury to or Death of Seaman

(a) Application of Railway Employee Statutes; Jurisdiction

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the

court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. § 688(a)

This petition also raises issues under the following provisions of the United States Longshoremen's and Harbor Workers' Compensation Act:

Coverage

(a) Disability or Death; Injuries Occurring Upon Navigable Waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

33 U.S.C. § 903(a) and,

Definitions

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . .

(G) a master or member of a crew of any vessel.

33 U.S.C. § 902(3)(G)

———o———

STATEMENT OF CASE

This case arises out of injuries allegedly sustained by Jerry A. Landry who claims to have slipped and fallen aboard the M/V *SEAN G* on December 14, 1984. The M/V *SEAN G* was owned and operated by John E. Graham & Sons and was at that time being laid up as it had no contract or work to perform.

Plaintiff was a shore-based employee of John E. Graham & Sons (hereafter referred to as "Graham"). The job title of the position filled by Plaintiff was "port captain". Plaintiff claims that while attempting to move a cardboard box containing gallons of milk from the *SEAN G* to the pickup truck located on the shore, he slipped and fell.

Original proceedings were filed on September 3, 1985 in the Parish of St. Mary, State of Louisiana. Jerry A. Landry and his wife, Elizabeth Hebert Landry, sued Graham claiming that Mr. Landry was a seaman within the purview of 46 U.S.C. 688, known as the Jones Act. Subsequently, Plaintiffs amended this petition to name as Defendants the various insurers of Graham, both primary and excess.

Limited discovery then commenced and the depositions of Plaintiff, Jerry A. Landry; his superior, the senior port captain, Horace Bernard Hudson, Jr.; and Mrs. Hudson were taken.

With the case in that posture, the Defendants prepared and filed a Motion for Summary Judgment on the basis that the primary Plaintiff, Jerry A. Landry, was not

a seaman as defined by 46 U.S.C. § 688 and the cases decided thereunder. A judgment in favor of Defendants on this point would have been completely dispositive of the case since Plaintiff would be relegated to compensation remedies if he was not a Jones Act seaman. Subsequently, Plaintiff filed his own motion for summary judgment, claiming that he was entitled to a summary judgment declaring him to be a seaman covered by the Jones Act.

The trial court scheduled a pre-trial conference at which oral arguments were held on the competing motions for summary judgment. On October 3, 1986 the court denied Graham's motion and granted Plaintiff's motion, holding that Plaintiff was a Jones Act seaman based on the conclusions that (1) Plaintiff performed a substantial part of his work aboard a "fleet of vessels" under the same ownership and control and (2) Plaintiff contributed to the accomplishment of the mission of those vessels.

Defendants filed an application for new trial which was denied by Judge Bienvenu on December 18, 1986.

Subsequently, Defendants took two steps. First, Defendants filed an application for supervisory writs based upon the denial of their motion of summary judgment. Under Louisiana law an appeal does not lie from such a denial and, accordingly, Defendants took the only avenue available to them, they applied to for supervisory writs. Second, with respect to the granting of the motion for summary judgment filed by Plaintiff, Defendants did lodge an appeal from that ruling. On March 20, 1987, the Court of Appeal denied the application for supervisory writs with the following statement:

"Relator has filed a suspensive appeal and all issues raised herein may be addressed on appeal."

Plaintiffs filed a motion to dismiss the appeal contending that the judgment appealed from is interlocutory in nature and therefore not appealable. That motion was denied on April 14, 1987.

The case then proceeded to oral argument and on April 19, 1988, the Court of Appeal entered its judgment affirming the ruling of the trial court that Plaintiff was a seaman for Jones Act purposes.

Defendants-Appellants-Applicants then applied for a rehearing and on July 18, 1988, the Court of Appeal granted a limited rehearing. The rehearing was limited to the issue of whether or not the trial court improvidently granted Plaintiffs' motion for summary judgment since that judgment apparently did not grant Plaintiffs "part of the relief for which they had prayed." That issue was then briefed and, on September 6, 1988, the court held that the granting of plaintiff's motion was improvident, vacated its original judgment and remanded the entire case to the court below. This action by the Court was predicated on Louisiana procedural law and had nothing to do with the issues applicable to seaman status.

The posture of the case at this time is that neither the motion of the Plaintiff nor of the Defendant has been granted and the entire case has been remanded to the District Court for trial.

Defendants then applied for writs of certiorari or review to the Supreme Court of the State of Louisiana which application was denied on November 28, 1988. John

E. Graham and Sons and their insurers, Highlands Insurance Company, Americas Insurance Company, Citadel Insurance Company, Ranger Insurance Company, New York Marine Managers, Inc., and Certain Underwriters at Lloyds, London and Institute Companies are now petitioning this Honorable Court to grant a writ of certiorari directed to the Supreme Court of Louisiana since the issues raised in this case concerning the legal status of one claiming to be a seaman for purposes of the Jones Act are of overriding importance and on which this Court has not spoken in over 30 years.

Facts

Graham operates a fleet of offshore and inshore vessels in support of the oil industry. The home office of Graham is located at Bayou La Batre, Alabama, and its vessels operate all along the Gulf Coast. On December 14, 1984, the Plaintiff, Jerry A. Landry, was employed by Graham as a port captain and worked in the Berwick/Morgan City office of Graham.

Approximately 90-100 vessels are operated under the supervision of Graham in the Gulf of Mexico and because the vessels are chartered by numerous different companies operating all over the Gulf, different ports have to be established to support the operations of the vessels. Each port has port captains who are responsible for vessels that may come into that port. The vessels may be serviced at any port at which there is a facility operated by Graham.

At the time in question, approximately 18-20 vessels were supported by the port of Berwick/Morgan City. The

identity of the 18-20 vessels changed according to the work requirement offshore. The vessels that operated out of the port of Berwick/Morgan City did so purely as a matter of convenience and expedience. If there was work for it in the area serviced by the port of Berwick/Morgan City, a vessel would use Berwick/Morgan City as the port from which it obtained support, including provisions, fuel, crew and repairs. If, however, that vessel obtained work farther away, it would then use a different port.

All shore-based personnel of Graham, specifically including port captains, worked on a random basis, i.e., on whatever vessel happened to need service rather than on any specific vessel. The work performed by the port captain, and in particular Landry, consisted of the normal shore side support expected from the shore establishment of any company engaged in operating vessels. For example, Landry's responsibilities included either performing or ordering mechanical work on Graham's vessels; minor maintenance such as repair or replacement of lights, unclogging sewerage pipes, repairing kitchen appliances and replacing small defective appliances; clerical work such as checking logbooks, transfers of individuals and witnessing crew changes; and messenger type responsibilities such as running errands, delivering groceries, picking up unneeded groceries (the very thing being done at the time of the alleged accident) and delivering supplies.

The *SEAN G*, the vessel on which Landry claims to have been injured, had been operating out of another port when its contract with its charterer expired. Since there was then no work for that vessel to do, the crew brought

it to the port of Berwick/Morgan City to be laid up pending receipt of further work assignments. Upon arrival the crew was released. No one was left aboard after the crew's departure. Mr. Landry boarded the vessel to take off foodstuffs requiring refrigeration, including the fresh milk, so that it could be used on other vessels operating out of the port of Berwick/Morgan City.

Mr. Landry was assigned, by his own admission, to no particular vessel. Indeed, he performed his duties as port captain in a purely random fashion. He serviced any vessel that happened to need servicing or, if there were no vessels in port, he simply performed his normal administrative, shore-type duties. On very rare occasions, perhaps five or six in the entire six years of his employment with Graham, Landry would, in case of a sudden emergency, render assistance if a boat had some type of unusual problem. However, except for those rare occasions, all of the work performed by Landry was done when the boat being worked on was in port. Landry had an office and a desk available and he used it as necessary to do the paperwork required of him in his job.

It is uncontradicted that the identity of the vessels serviced in Berwick/Morgan City changed in accordance with work requirements; that the M/V *SEAN G*, the vessel on which Plaintiff claims he was injured had been serviced from another port until just before the alleged accident and that the work performed by Plaintiff consisted of providing support from the shore to whatever vessels required support when he was on duty.

Finally, it is uncontradicted that Plaintiff provided shore-based support in a random manner. Only on rare

occasions did he venture beyond the confines of Berwick/ Morgan City and then only to perform a single specific task after which he returned to port.

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ARGUMENT

The Jones Act, 46 U.S.C. § 668(a), provides a cause of action for "Any seaman who shall suffer personal injury in the course of his employment . . ."

This case has presented the issue of who is a "seaman" for the purposes of the Jones Act and the answer to this point has strayed far from the underlying Jones Act principles since it qualifies as a seaman a clearly shore-based employee who has no connection with the ultimate mission of the vessels.

The Court of Appeals for the Fifth Circuit has taken a most expansive view in defining who is a seaman for Jones Act purposes. The District Court of Louisiana, the Appellate Court and the Supreme Court in this case have felt themselves bound by the rulings of the Fifth Circuit and, accordingly, have held that a port captain is a seaman within the intendment of the Jones Act.

Although the specific finding of the District Court holding the port captain to be a seaman was reversed by the Court of Appeal, First Circuit, State of Louisiana, that reversal was because of procedural grounds and not because the court felt that the Plaintiff did not meet the Fifth Circuit criteria for being a Jones Act seaman. In-

deed, in its first opinion[1] the Court of Appeal specifically found that Plaintiff was a seaman. It was only on rehear- when it considered the procedural point that the court vacated its original judgment and reversed the summary judgment in favor of the Plaintiff and remanded the case to the District Court for further proceedings.[2]

There are many issues inherent in the seaman status issue and this case specifically presents a number of them. Included in those numerous issues are the following:

> (1) If in fact one can be a seaman within the intendment of the Jones Act by attachment to a "fleet of vessels" rather than by assignment to a specific vessel, what, if any, are the legal requirements to define the "fleet" to which the worker may be attached to satisfy his status as the member of the crew of a "fleet of vessels"?
>
> (2) Is one who provisions, fuels and supplies a vessel from a shore-side base within the definition of a "member of the crew of a vessel" as that term is used within the Jones Act?
>
> (3) In order to qualify as a member of the crew of a vessel and, therefore, within the Jones Act as opposed to Longshore and Harbor Workers Compensation Act, must one's duties be in conjunction with the transportation function and mission of the vessel or is some lesser connection acceptable?

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[1] *Landry v. John E. Graham & Sons, Inc.*, 525 So.2d 276 (La.App. 1st Cir. 1988)

[2] *Landry v. John E. Graham & Sons, Inc.*, 533 So.2d 975 (La.App. 1st Cir. 1988)

(A) *The "Fleet" Issue.* Since *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523 (5th Cir. 1960), the Court of Appeals for the Fifth Circuit, at least, has held that a worker whose relationship with several identifiable ships is substantial in point of time and work meets the "more or less permanent connection test" of Jones Act seaman status.

However, since that decision, the same court has contradicted itself on numerous occasions. For example, in *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), cert. denied, 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed.2d 212 (1984), the court reversed the District Court and held that there was no requirement that the fleet have common ownership or control. Thus, the "identifiable" part of the identifiable fleet doctrine appeared to have been repealed by the Fifth Circuit.

In fact, the Fifth Circuit simply did not like the result in *Bertrand* and only temporarily expanded the definition of "fleet". Two cases in particular, the *Barrett* case and the *Buras* case showed clearly that the Fifth Circuit regarded *Bertrand* as an aberration.[3]

The true underlying basis for the decision of the court in *Bertrand* appears in the *Buras* decision.[4] In that case the court stated that since the claimants were arguably "classical blue water" workers engaged in traditional maritime activities, they were unwilling to conclude that

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[3]*Buras v. Commercial Testing & Engineering Company, et al*, 736 F.2d 307 (5th Cir. 1984);

Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986)

[4]*Buras, supra*, 736 F.2d 307, 311-312

ownership or chartering would control the determination of seaman status as a matter of law.

Barrett reaffirmed the original test that the word "fleet" meant ". . . an identifiable group of vessels acting together or under one control."[5]

In this connection, the opinions of the Fifth Circuit in a number of other cases are also instructive. Those opinions reaffirm the necessity of an identifiable fleet under singular control.[6]

Despite this spate of jurisprudence showing that *Bertrand* is, in fact, not the law, the Supreme Court of Louisiana, the District Court and the Court of Appeal, First Circuit, all erred in this case. Indeed, in the opinion of the Court of Appeal in this case the following language appears:

> "The Fifth Circuit further notes in *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), U.S. cert. denied, 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed.2d 212 (1984), although it was formerly a requirement that a fleet of vessels have common ownership or control if one seeks seaman status under a fleet of vessels concept, common ownership or con-

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[5]*Barrett, supra,* 781 F.2d 1067, 1074

[6]*White v. Valley Line Company,* 736 F.2d 304 (5th Cir. 1984);

Munguia v. Chevron Company, U.S.A., et al, 768 F.2d 649 (5th Cir. 1985);

Langston v. Schlumberger Offshore Services, Inc., 809 F.2d 1192 (5th Cir. 1987);

Lirette v. N.L. Sperry Sun, Inc., et al, 831 F.2d 554 (5th Cir. 1987); and

Ardleigh v. Schlumberger Ltd., et al, 832 F.2d 933 (5th Cir. 1987)

trol is no longer required, as the scope of Jones Act coverage as found by the courts is gradually expanding.'[7]

The court has clearly strayed into error, accepting the singular language in *Bertrand* as being the law. That is clearly wrong and should be corrected by this Court.

(B) In addition, this Court should clearly consider the implications of permitting one who does nothing more than provision, fuel and supply a vessel to claim seaman status.

With the abandonment of the navigational function test, the Court of Appeal for the Fifth Circuit has clearly opened the way for errors of the type committed in this case. The reasons for ruling issued by the learned state district court judge exemplify this. On page 4 of his reasons, Judge Bienvenu had the following to say:

> "The second test is that his duties must contribute to the function of the vessel or the accomplishment of its mission or the operational welfare of the vessel in terms of its maintenance during its movement or during anchorage for future trips. *It can well be said that the mission of the vessels was something other than what Mr. Landry did for them or in connection with them. Their mission, obviously, was to perform certain work away from the port; but it seems to me that it must be said that the duties and the work that he performed contributed to the accomplishment of that mission.* The mission could not be accomplished without fuel, for example, or supplies and proper crew and repairs to defective machinery, although I am aware that he did not perform all repairs, he did perform some; and by repairs, I mean more than changing light bulbs, although he did that, too. He per-

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[7]525 So. 2d 276, 281

> fromed (sic), it seems, all but the most sophisticated type of repairs and maintenance. *To me, that certainly contributed to the accomplishment of the mission of those vessels.''* (Emphasis supplied.)

This is clearly the misunderstanding that this Court must correct.

(C) Finally, there is the conflict that exists between the Fifth Circuit, the Third Circuit and the Seventh Circuit and with the pronouncements of this Court in *South Chicago Coal & Dock, et al v. Bassett,* 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed 732 (1940); *Desper v. Starved Rock Ferry Co.,* 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205 (1951); *Swanson v. Marra Bros., Inc.,* 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946), and *Norton v. Warner Co.,* 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944).

The conflict with the Seventh Circuit in *Johnson v. John F. Beasley Construction Co.,* 742 F.2d 1054 (7th Cir. 1984) and with the Third Circuit in *Simko v. C&C Marine Maintenance Co.,* 594 F.2d 960 (3rd Cir. 1979), cert. denied, 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed.2d 42 (1979), is clear. The Fifth Circuit simply refuses to recognize that there is any requirement that the putative seaman serve a navigational or transportation function. The Third and Seventh Circuits recognize this requirement.

The Fifth Circuit has simply strayed far afield from the underlying Jones Act principles and completely ignores the navigational or transportation aspect of the status test. It is clear that other courts, particularly the courts of the State of Louisiana, regard this as the law by which they are bound and, accordingly, this Honorable Court

should grant certiorari to clarify and expound on the seaman status test.

As was stated by Justice White in his dissent in the denial of a writ of certiorari in *International Oilfield Divers, Inc., et al v. Pickle,* 479 U.S. 1059, 107 S.Ct. 939, 93 L.Ed.2d 989 (1987), there is a direct split between the Courts of Appeal and, internal disagreement within the Fifth Circuit. It is at this point going even further with the error having branched over to the Supreme Court of the State of Louisiana. Since the Third and Seventh Circuits have clearly rejected the view that one need not assist in the transportation function of a vessel to be a seaman and the Fifth Circuit has espoused it, the time has come for this Court to grant certiorari in this case and clarify that issue and resolve the conflict between the circuits.

Respectfully submitted,

VOORHIES & LABBE'
(A Law Corporation)

By: W. GERALD GAUDET (1515)
700 St. John Street
Lafayette, LA 70501
Phone: (318) 232-9700

Attorney for Defendants-Petitioners,
John E. Graham and Sons
Highlands Insurance Company
Americas Insurance Company
Citadel Insurance Company
Certain Underwriters at Lloyds,
London and Institute Companies

WALTER W. CHRISTY
KULLMAN, INMAN, BEE & DOWNING
615 Howard Avenue
New Orleans, LA 70130
Phone: (504) 524-4162
Attorneys for Defendant-Petitioners
John E. Graham & Sons

MAT M. GRAY
FARIS, ELLIS, CUTRONE & GILMORE
Whitney Building
New Orleans, LA 70130-2657
Phone: (504) 581-6373

Attorneys for Dennis Edward
Jennings as nominee for certain
Underwriters at Lloyds, London
and certain companies of the
Institute of London Underwriters

JAMES HANEMANN, JR.
HANEMANN & ASSOCIATES
1010 Whitney Bank
New Orleans, LA 70112
Phone: (504) 522-6737

Attorneys for Defendants-Petitioners
Ranger Insurance Company
Highlands Insurance Company
New York Marine Managers, Inc.

APPENDIX

JERRY A. LANDRY

VERSUS NO. 75,716

JOHN GRAHAM & SONS, ET AL

16TH JUDICIAL DISTRICT COURT

PARISH OF ST. MARY

STATE OF LOUISIANA

OCTOBER 3rd, 1986

HON. C. THOMAS BIENVENU, JR., JUDGE PRESIDING

REASONS FOR RULING

BY THE COURT:

There is no dispute as to the fact of the plaintiff's job description in this case and, because of that, it becomes a question of law as to whether or not the job he performed qualified him as a seaman under the law. Consequently it is proper for this Court to render a summary judgment in the matter as requested by both sides of the issue.

Certainly, if there were no jurisprudence on the subject and this Court were asked initially and originally to determine whether the plaintiff, Mr. Landry, is a seaman; this Court would rule that he isn't, because the traditional concept of what a seaman is is completely unlike what Mr. Landry did for the defendant, John E. Graham and Sons. But this Court is not deciding it originally and is faced with a body of applicable jurisprudence which really, in the view of this Court, muddles the picture an awful lot. Mr. Hanemann points out in his memorandum an inclination apparently on the part of Federal Courts

to go back to the traditional definition of a seaman. The difficulty with that argument is that it hasn't happened yet and, at best, we may be seeing a beginning of a trend, but that is at best.

I frankly find it to be an extremely close question, as I analyze the jurisprudence in the case; although, as I say, philosophically, I agree with Mr. Gaudet, this man is not what I call a seaman. And let me tell you, gentlemen, I have spent a lot of time on this. I have been working on this case for a long time. This is not even the first time we were going to see it, so I have notes from previous occasions also.

I conclude, with some difficulty, that the jurisprudence compels me to rule that the plaintiff is a seaman. I can distinguish this situation from Fazio and Rotello in that, unlike the individuals whose status was involved in those cases, Mr. Landry was assigned to these vessels and did perform a substantial part of his time aboard them. I don't find that the factual situation in either Fazio or Rotello is enough like this one to be persuasive, although I have to say that the fleet of vessels concept in Fazio is a closer question than the type of work that the two individuals did.

Again, I think there is no disagreement that the controlling law is in Offshore Company v. Robinson, 266 Fed. 7, 769, and Barrett v. Chevron, 781 Fed. 2d 1067, both decisions, though quite a few years apart, of the United States Fifth Circuit Court of Appeals.

I find that under the test set up in Robinson and interpreted and applied later in the jurisprudence, that Mr. Landry meets the two-fold test. I will rule that I am

satisfied that he performed a substantial part of his work on a fleet of vessels under the same ownership and control. I don't think that there is any question about that. He performed more than a majority of his work aboard these vessels and, essentially, his entire job was aimed at taking care of the vessels while they were in port.

Now, the question, of course, as to whether the fleet of vessels in the instant case meets the definition of a fleet of vessels under the Robinson decision is a closer question, but I think it fits into that definition moreso than in Fazio. These were the vessels restricted to that port. They all belonged to the same owner and were all under the same control. I find that that is an identifiable fleet of vessels.

The second test is that his duties must contribute to the function of the vessel or the accomplishment of its mission or the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for future trips. It can well be said that the mission of the vessels was something other than what Mr. Landry did for them or in connection with them. Their mission, obviously, was to perform certain work away from the port; but it seems to me that it must be said that the duties and the work that he performed contributed to the accomplishment of that mission. The mission could not be accomplished without fuel, for example, or supplies and proper crew and repairs to defective machinery, although I am aware that he didn't perform all repairs, he did perform some; and by repairs, I mean more than changing of light bulbs, although he did that, too. He perfromed, it seems, all but the most sophisticated type of repairs and maintenance. To me, that certainly contributed to the accomplishment of the mission of those vessels.

He was not involved in navigation but I don't see that as the jurisprudential test at least at the present time.

As I say, I find it to be a very close question, even putting aside my philosophical definition of a seaman; but I think under the jurisprudence he meets the test.

For those reasons, I will grant summary judgment to the plaintiff and deny it as to the defendant-mover.

Franklin, Louisiana
October 8, 1986

A true and correct transcription.

/s/ Louise F. Giroir
LOUISE F. GIROIR

JERRY A. LANDRY AND HIS WIFE ELIZABETH HEBERT LANDRY	16TH JUDICIAL DISTRICT COURT
VERSUS NO. 75,716 DIV. "A"	PARISH OF ST. MARY
JOHN E. GRAHAM & SONS, ET AL	STATE OF LOUISIANA

JUDGMENT

Pursuant to a previous fixing, various pre-trial motions and motions for summary judgment were heard by the Court on Friday, October 3, 1986.

PARTIES:

JERRY A. LANDRY and his wife, ELIZABETH HEBERT LANDRY, plaintiffs, represented by R. Scott Ramsey, Jr. of McElroy & Ramsey, Ltd.; and

JOHN E. GRAHAM & SONS, represented by Walter W. Christy of Kullman, Inman, Bee & Downing; and

HIGHLANDS INSURANCE COMPANY, AMERICAS INSURANCE COMPANY, CITADEL INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYDS, LONDON AND INSTITUTE COMPANIES, represented by W. Gerald Gaudet of Voorhies & Labbe; and

NEW YORK MARINE MANAGERS, RANGER INSURANCE COMPANY and HIGHLAND INSURANCE COMPANY, as excess insurers, represented by James Hanemann, Jr. of Hanemann & Associates; and

MIDLAND INSURANCE COMPANY, represented by Randall K. Theumissen of Allen, Gooch, Bourgeois, Breaux, Robinson & Theunissen.

The Court, after considering the applicable law, evidence, pleadings, argument of counsel and for the reasons this day orally assigned renders the following judgment, to-wit

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion for summary judgment filed herein by the plaintiffs, JERRY A. LANDRY and his wife, ELIZABETH HEBERT LANDRY, be and the same is hereby granted and accordingly, this Court finds that, as of the time of the accident, JERRY A. LANDRY was a seaman, and enjoyed status as such under the provisions of 46 U.S.C.A., Section 688, commonly known as the "Jones' Act".

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the motions for summary judgment filed hereby by JOHN E. GRAHAM & SONS, HIGHLANDS INSURANCE COMPANY, AMERICAS INSURANCE COMPANY, CITADEL INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYDS, LONDON AND INSTITUTE COMPANIES, NEW YORK MARINE MANAGERS, and RANGER INSURANCE COMPANY, be and the same are hereby denied.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the motion of the plaintiffs, JERRY A. LANDRY, et ux, ordering the defendants, JOHN E. GRAHAM & SONS, et al, to pay cure be and the same is hereby partially granted and the defendants are ordered to pay, until maximum cure, all necessary medical expenses incurred by the plaintiff, JERRY A. LANDRY, as a result of injuries he received in the acci-

dent, which is the subject of this suit, to be paid to, or for medical treatment authorized by, Dr. William E. Meuleman, Dr. Robert Blereau, Dr. Jeffrey C. Fitter and/or Dr. Lawrence Russo. The defendants shall not at this time be responsible for the payment of any medical or related expenses incurred as a result of plaintiff's being evaluated, treated or cared for by Dr. Christopher Cenac.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, since the parties have stipulated that the defendants shall pay to the plaintiff, JERRY A. LANDRY, the sum of twenty dollars ($20.00) per day, it is not necessary for the court to consider an award for maintenance payments until maximum cure.

IT IS HEREBY FURTHER ORDERED, ADJUDGED and DECREED that the motion of the defendants to compel the plaintiff, JERRY A. LANDRY, to submit to an examination by Dr. William E. Meuleman is hereby granted and, accordingly, the plaintiff is ordered to submit to a medical examination by Dr. Meuleman at a date and time to be arranged by the parties. Defendants shall pay any travel expenses incurred by plaintiff in traveling from his home to and from the place of examination at the rate of 19¢ per mile. Defendants shall also pay for the cost of any examinations of plaintiff by Dr. Meuleman, as well as all expenses for testing, treatment and medications, to the extent the same are related to the injuries which serve as a basis for this action.

ORDER GRANTED in Open Court at Franklin, St. Mary Parish, Louisiana, on the 3rd day of October, 1986.

JUDGMENT READ, RENDERED AND SIGNED at St. Martinville, Parish of St. Martin, Louisiana, this 3rd day of November, 1986.

/s/ C. Thomas Bienvenu, Jr.
District Judge

Received and Filed November 4, 1986

/s/ Laura Deslatte,
Dy. Clerk of Court
Clerk's Office, Franklin, LA. Nov. 6, 1986.
A true copy of the original

Attest /s/ Laura Deslatte
Dy. Clerk of Court

JERRY A. LANDRY AND ELIZABETH HEBERT LANDRY	16TH JUDICIAL DISTRICT COURT
VERSUS	DOCKET NO. 75,716 "A"
JOHN GRAHAM & SONS AND MIDLAND INSURANCE COMPANY	ST. MARY PARISH, LOUISIANA

• • •

ORDER

CONSIDERING THE FOREGOING;

IT IS ORDERED, that the Application for New Trial filed by defendants herein, JOHN E. GRAHAM & SONS, HIGHLANDS INSURANCE COMPANY, AMERICAS INSURANCE COMPANY, CITADEL INSURANCE COMPANY, and CERTAIN UNDERWRITERS AT LLOYDS, LONDON AND INSTITUTE COMPANIES, be and the same is hereby denied.

St. Martinville, Louisiana, this 18th day of December, 1986.

/s/ C. Thomas Bienvenu, Jr.
DISTRICT JUDGE

Received and Filed November 17, 1986

/s/ Laura Deslatte,
Dy. Clerk of Court
Clerk's Office, Franklin, LA. Dec. 23, 1986
A true copy of the original

Attest /s/ Laura Deslatte
Dy. Clerk of Court

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

JERRY A. LANDRY
ELIZEBETH HEBERT
LANDRY

NO. CW/87/0125

VERSUS

JOHN GRAHAM & SONS,
ET AL.

MARCH 20, 1987

In Re: John E. Graham & Sons, applying for supervisory writs, Sixteenth Judicial District Court, Parish of St. Mary, No. 75,716

MARCH 20, 1987

WRIT DENIED. We decline to exercise our supervisory jurisdiction. Relator has filed a suspensive appeal and all issues raised herein may be addressed on appeal.

DWL
WAE
JLW,JR.

MARCH 20, 1987
COURT OF APPEAL, FIRST CIRCUIT

/s/ Karen West, Deputy
CLERK OF COURT
FOR THE COURT

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

Post Office Box 4408
Baton Rouge, Louisiana 70821

DATE: APRIL 14, 1987

DOCKET NO.: CM020487

JERRY A. LANDRY AND
ELIZABETH HEBERT
LANDRY

VERSUS

JOHN E. GRAHAM &
SONS, ET AL

TO: R. Scott Ramsey, Jr.
P.O. Drawer 230
Berwick, LA 70342

W. Gerald Gaudet
P.O. Box 3527
Lafayette, LA 70502

NOTICE OF JUDGMENT ON MOTION

You are hereby served with a copy of the opinion in the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of the Uniform Rules of the Courts of Appeals, effective July 1, 1982.

CLERK OF COURT

I hereby certify that this opinion and notice of judgment were mailed to the trial judge, the clerk of the trial court, all appeal counsel of record, and all parties not represented by counsel this date.

/s/ Karen West
STANLEY P. LEMOINE, CLERK
COURT OF APPEAL,
FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.C.P. ART. 2166; C.Cr.P ART. 922; Act No. 451, EFFECTIVE AUGUST 30, 1983.

FEE FOR REHEARING, R.S. 13:352, AS AMENDED, EFFECTIVE AUGUST 30, 1986.

JERRY L. LANDRY AND HIS WIFE, ELIZABETH HEBERT LANDRY	STATE OF LOUISIANA COURT OF APPEAL
VERSUS	FIRST CIRCUIT
JOHN E. GRAHAM & SONS, ET AL.	NO. CM/87/0204

MOTION TO DISMISS UNLODGED APPEAL (Docket No. 75,716 "A"), SIXTEENTH JUDICIAL DISTRICT COURT, PARISH OF ST. MARY, STATE OF LOUISIANA.

BEFORE: EDWARDS, WATKINS AND LEBLANC, JJ.

LEBLANC, J.

(Filed April 14, 1987)

Appellees, Jerry and Elizabeth Landry have filed a motion to dismiss this unlodged appeal, contending the judgment is interlocutory and not appealable.

Jerry Landry was injured when he fell aboard a ship owned by his employer, John Graham & Sons. Landry was employed as a port captain when the accident occurred. Landry and his wife sued Graham in tort, alleging he was a "seaman" under the Jones Act and therefore not limited to state worker's compensation or longshore and harbor worker's compensation.

Both defendants and plaintiffs filed motions for summary judgment on the issue of Landry's seaman status.[1]

Following a hearing, the trial court denied defendants' motion and granted plaintiffs' motion, finding Landry was entitled to seaman status and that he may pursue his tort claim. Defendants then suspensively appealed the granting of plaintiffs' motion. Plaintiffs have moved to dismiss the appeal, contending the judgment holding that Landry was a seaman is interlocutory and not appealable.

An appeal may be taken from a final judgment or an interlocutory judgment which causes irreparable injury. La. Code Civ. P. art. 2083. A judgment which does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment. Code Civ. P. art. 1841. An interlocutory judgment neither disposes of issues applicable to the merits, nor finally affects the merits, nor deprives defendant of benefits to which he may be entitled at a final hearing. *River Cities Constr. v. Barnard & Burk, Inc.*, 444 So.2d 1260, 1268 (La. App. 1st Cir. 1983), *writs denied*, 446 So.2d 1223, 1226 (La. 1984).

A judgment that determines the merits in whole or in part is a final judgment. La. Code Civ. P. art. 1841. A final judgment need not dispose of all of the issues between the parties. All that is required is that it determine issues involved on the merits of the action. *Lambert v. National Bank of Commerce*, 472 So.2d 284 (La. App. 1st Cir. 1985); *Devillier v. City of Opelousas*, 243 So.2d 118 (La. App. 3d Cir. 1971).

In *Cooper v. Cooper*, 491 So.2d 497 (La. App. 3d Cir. 1986), the trial court rendered a judgment in a partition suit on the issue of when the community property regime between the parties terminated. (A separate judgment partitioning the community property was rendered later.)

The Third Circuit held that the judgment deciding when the community regime terminated was a partial final judgment.

In the instant case, the determination of Landry's seaman status affects the merits of the action. If the court had found that Landry was not a seaman under the Jones Act, defendant would have been entitled to a dismissal of the tort claim. Consequently, the judgment deprives defendants of a benefit to which it may have been entitled at a final hearing. Therefore, the judgment decides the merits of the action in part and is a final judgment. Accordingly, this motion to dismiss defendants' appeal is denied.

MOTION TO DISMISS APPEAL DENIED.

FOOTNOTE

1. It appears plaintiffs' motion for summary judgment was unauthorized since they did not move for a judgment for all or part of the relief for which they had prayed. See La. Code Civ. P. art. 966. Although a summary judgment may be rendered on the issue of liability alone under section C of article 966, that section does not apply in this instance. The resolution of Landry's seaman status only determines his right to bring suit, not Graham's ultimate liability. *See Holland v. Allied Structural Steel Co.*, 539 F.2d 476 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105, 97 S.Ct. 1136, 51 L.Ed.2d 557 (1977). However, the issue of whether plaintiffs' use of summary judgment was authorized is a question to be determined on the merits of this appeal.

JERRY A. LANDRY AND HIS WIFE, ELIZABETH HEBERT LANDRY

VERSUS

JOHN E. GRAHAM & SONS, INC. AND MIDLAND INSURANCE COMPANY

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

NO. 87 CA 0372

ON APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT (NO. 75,716), PARISH OF ST. MARY, HONORABLE C. THOMAS BIENVENU, JR., JUDGE PRESIDING

(Filed Apr. 19, 1988)

BEFORE: WATKINS, CARTER AND FOIL, JJ

WATKINS, J.

Jerry A. Landry and Elizabeth Hebert Landry brought an action in negligence under the Jones Act and for unseaworthiness under the General Maritime Law against John E. Graham and Sons, Inc., and its insurer, Midland Insurance Co. Landry seeks to be accorded seaman status under the Jones Act, 46 U.S.C.A. 688. Defendants moved for summary judgment finding Landry not to have been a seaman for Jones Act purposes. Plaintiffs moved for partial summary judgment finding Jerry Landry to have been a seaman. The trial court found that there was no genuine issue of material fact (LSA-C.C.P. art. 966), and that Landry was a seaman for Jones Act purposes. Defendants appealed. We affirm.

Landry had been employed by John E. Graham and Sons from 1979 until 1984, in a job the company titled port captain, a position subordinate to the senior port captain. The vessels were moored at Berwick and Morgan City, Louisiana. While Landry was performing his duties

aboard the M/V SEAN G., he slipped and fell, and allegedly sustained injuries for which he alleges he is entitled to recovery under the Jones Act.

John E. Graham and Sons owns or operates a fleet of some eighty vessels chartered by various petroleum companies, of which some eighteen or twenty are at Morgan City-Berwick at any given time. The home port of the vessels is Bayou LaBatre, Alabama.

Defendants contend that it is clear from the facts that plaintiff is a harbor worker and not, therefore, a seaman. As a result defendants argue that they are entitled to judgment decreeing plaintiff not a seaman, as a matter of law.

Landry would regularly pilot or captain the vessels himself; he would pilot the vessels that were going on jobs to the fuel dock to fuel them and to put the necessary water and supplies on them. On two occasions he flew offshore to pick up boats and pilot them back to the dock because the captain or the crew were incapable of operating the vessel. He would fly offshore and board Graham's vessels to make inspections and give safety meetings. If one of Graham's vessels would be in distress by running aground or having a rope in its wheels, Landry would captain another of Graham's vessels to the distressed vessel to tow it back; he would also act as a pilot to Graham vessels coming up the river. Landry also piloted vessels from Morgan City to Houma, Louisiana on two or three occasions.

Part of Landry's responsibilities were to witness all crew changes onboard the vessels; to sound the fuel tanks; to check the log books; to obtain transfers and to get a repair list from the departing crew. He was responsible for performing various repairs onboard the vessels; loading and unloading groceries from the vessels; bringing

supplies to the vessels; and taking sick or injured employees to the doctor or hospital.

Laundry had an onshore office with a desk. However, he first, after leaving home each morning at 6:00 o'clock, went to the docks to perform his duties with any John E. Graham and Sons' vessels docking, and only later in the day went to his office to dispatch an electrician or a mechanic, should one be needed aboard a vessel. Landry returned home each night. Usually he spent some five hours aboard ship each day.

The history of recovery as afforded by the Jones Act is well and clearly set forth in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986), which stated as follows:

> The Jones Act grants its liberal remedies to "any seaman." This term is not defined in the Act, and in the years immediately following the passage of the Jones Act it was given an expansive interpretation by the Supreme Court. In *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157 (1926), the Supreme Court held that "seaman" included longshoremen when they were employed in maritime work on navigable waters. 272 U.S. at 52, 47 S.Ct. at 19. The next year Congress passed the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (LHWCA), which provides a compensation remedy for all maritime workers injured on navigable waters, except those employees who are "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). Thus, the coverage of the Jones Act is narrowed by the LHWCA. The LHWCA limits the broad term "seamen" so that only "member[s] of a crew of a vessel" are exempted and permitted to be covered by the Jones Act. Just what the term "member of a crew of a vessel" signifies, however, is a question with which the Supreme Court grappled from 1940 until 1958, and which has concerned the circuit courts ever since.

The first real attempt by the Supreme Court to define the term "member of a crew" in order to determine the scope of the Jones Act was *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732 (1940), a suit for the death of an employee who had worked on a lighter used for fueling steamships. The decedent's primary job was to facilitate the passage of coal from the lighter to the steamship. On occasion he threw lines and cleaned the lighter. The court observed that whether an individual is a member of a crew is a question to be left to the trier of fact, and concluded that "[t]he word 'crew' does not have an absolutely unvarying legal significance." *Id.* at 258, 60 S.Ct. at 548. The court went on to state:

> [The LHWCA] as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen [citing *International Stevedoring Co. v. Haverty*] were still regarded as distinct from members of a "crew." They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation.

309 U.S. at 260, 60 S.Ct. at 549. Since the employee's duties had little to do with navigation, the Supreme Court concluded that he was not a member of the crew and thus was covered by the LHWCA. This restrictive approach to the seaman-status question was to be relaxed by later cases.

The next case to consider the status question was *Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944). The trial court found a bargeman who lived aboard the barge, and whose duties included pumping, tying and untying lines, putting out naviga-

tional lights, and assisting while the barge was in tow to be a harbor-worker, not a member of the crew. The Court of Appeals reversed, and the Supreme Court affirmed the reversal. In reaching this decision, the Court repeated the *Bassett* statement that the term "crew" embraces individuals who are naturally and primarily on board the vessel to aid in her navigation, but went on to explain that:

> [N]avigation is not limited to "putting over the helm." It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can "hand, reef and steer." Judge Hough pointed out in the Buena Ventura that "everyone is entitled to the privilege of a seaman who, like seamen, at all times contribute to and labor about the operation and welfare of the ship when she is upon a voyage." We think that "crew" must have at least as broad a meaning under the Act.

321 U.S. at 572, 64 S.Ct. at 751 (footnotes and citations omitted). Of particular significance for our discussion today is one of the final lines of this opinion, which states, "[Plaintiff] moreover had that permanent attachment to the vessel which commonly characterizes a crew." *Id.* at 573, 64 S.Ct. at 751.

The next case of significance for our analysis is *Gianfala v. Texas Company*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955), an action for death of a worker assigned to a submersible drilling barge who was killed while helping to unload pipe from an adjacent cargo barge. The testimony concerning the employee's duties was undisputed. A jury found the employee to be a crew member, and the district court entered a judgment on the verdict in plaintiff's favor. This circuit reversed, concluding that, on undisputed facts, the status question was one of law to be resolved by the judge. *Texas Company v. Gianfala*, 222 F.2d 382, 386 (5th Cir. 1955). We concluded that the drilling barge

was not in navigation and that the decedent was on board as a member of a *drilling crew,* not as a member of a *ship's crew. Id.* at 387. The Supreme Court disagreed with our conclusion and, without explanation, reversed and remanded with directions for the district court to reinstate its judgment. 350 U.S. at 879.

Next came *Senko v. La Crosse Dredging Corp.,* 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed. 404, (1957) in which the plaintiff was hired to splice rope, stow supplies, and in general clean and maintain an anchored dredge barge. An Illinois state court jury found that the plaintiff was a seaman; an Illinois appellate court reversed this finding holding that there was insufficient evidence from which to find the plaintiff to be a crew member. The Supreme Court granted certiorari and reversed, stating that on these facts it was a reasonable inference that the plaintiff was responsible for the barge's seaworthiness. 352 U.S. at 372-73, 77 S.Ct. at 416-17. More significantly, the court stated: "Our holding [in *South Chicago Coal & Dock Co. v. Bassett*] that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact." 352 U.S. at 374. Since the plaintiff performed almost all of his duties on or on behalf of the dredge, the Supreme Court considered him to be "permanently attached to and employed by the dredge as a member of its crew." *Id.* at 372, 77 S.Ct. at 417. This meant that there was sufficient evidence to support a jury finding of crew member status.

Two brief per curiam opinions ended the Supreme Court's consideration of the crew member status issue. The first of these, *Grimes v. Raymond Concrete Pile Co.,* 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737 (1958), involved a piledriver who assisted in the completion of a "Texas tower," a radar relay installation similar to a fixed drilling platform, while it was being constructed in a shipyard. Grimes lived on the tower

and kept its equipment in operating condition while it was being towed out to its location at sea. After the tower reached its location and was anchored, the plaintiff Grimes performed only piledriving duties. Six days later, he was injured while returning from a trip from a nearby barge to the tower. Grimes contended that he was a member of the crew of the barge, the Texas tower, or both. The court of appeals held that Grimes was not a crew member as a matter of law; the Supreme Court reversed without explanation, citing *Senko, Gianfala,* and *Bassett* for the proposition that there was sufficient evidence to send the status issue to the jury. In the second case, *Butler v. Whiteman,* 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958), the decedent performed odd jobs for the defendant around the defendant's wharf, barge and tug, all of which were on the Mississippi River. The tug had been out of navigation for some months before the decedent's death, and immediately before his accident the decedent had apparently been readying the tug for inspection and return to river service. The day of the accident he had been cleaning its boilers. The Supreme Court again held, without explanation, that whether the decedent was a Jones Act crew member was a jury question. 356 U.S. at 271, 78 S.Ct. at 735. With this 1958 decision the Supreme Court ended, for all practical purposes, its consideration of the Jones Act status issue.

Prior to 1958 this circuit had utilized a test originated by the first circuit in *Carumbo v. Cape Cod S.S. Co.,* 123 F.2d 991 (1st Cir. 1941), and adopted in *McKie v. Diamond Marine Co.,* 204 F.2d 132 (5th Cir. 1953): "The essential and decisive elements of the definition of a 'member of a crew' [are] that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation." 204 F.2d at 136. By 1959, however, the intervening Supreme Court decisions in *Gianfala, Grimes* and *Butler* called

for a reevaluation of this test, and this our court undertook in *Offshore Company v. Robison.* Robison was a roughneck permanently assigned to a drilling rig mounted on a barge in the Gulf of Mexico. He was injured while attempting to escape from a runaway section of casing. 266 F.2d 771-72. Robison sued his employer, contending that he was a member of the crew of the barge on which he was injured. A jury agreed with these contentions. *Id.* at 773 n. 4. On appeal, the panel, speaking through Judge Wisdom, surveyed the Supreme Court cases and other jurisprudence, and concluded:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

266 F.2d at 779. This test does not include the "aid-to-navigation" language which appeared in the *McKie* test and the early Supreme Court decisions. Explaining the omission, the opinion stated:

> Our review of the cases shows this test has been watered down until the words have lost their natural meaning. . . . we attach less importance to either of these catchphrases than we do to the cases piled on cases in which recovery is allowed when by no stretch of the imagination can it be said that the claimant had anything to do with navigation and is a member of the ship's company

> only in the sense that his duties have a connection with the mission or the function of the floatable structure where he was injured.

Id. at 780. *Robison* also emphasized that the Supreme Court cases outlined above had already made clear that the status determination was, like any other factual determination, generally to be entrusted to the jury:

> [The terms "seaman," "vessel," and "member of a crew"] have such a wide range of meaning under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts.

266 F.2d at 779-80 (footnotes omitted).

Robison distilled a test from the existing meager Supreme Court authority on the subject and the Supreme Court has not directly addressed the issue since. For over twenty-five years, since 1959, the *Robison* test has stood in this circuit as the test for whether the status question should go to the jury, and also for the corollary question, whether the evidence of crew member status is sufficient to support a jury verdict. It has been cited more than ninety-five times, relied on in innumerable other unpublished circuit and district court opinions, and considered a lighthouse by both plaintiffs' and defendants' counsel in compromise negotiations.

The many circuit and district court opinions have, however, inevitably emphasized different portions of the *Robison* test, and, in the course of doing so have

> created some inconsistencies. Very few of these have involved the second major prong of the *Robison* test, whether the employee contributed to the function of the vessel or to the accomplishment of its mission. This aspect of the test is by its nature easily ascertained—for example, Robison's duties aboard the seagoing drilling platform clearly contributed to the function that it was designed to serve—drilling for oil.

(Footnotes omitted).

The history of Jones Act jurisprudence demonstrates, and a case cited by defendants, *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (U.S. 5th Cir. 1987), *rehearing denied*, 823 F.2d 552, specifically holds that if one is a longshoreman under the Longshore and Harbor Worker's Compensation Act § 2(3) as amended 33 U.S.C.A. § 903(3), he cannot be considered to be a seaman under the Jones Act, supra. Still the duties of piloting the vessels owned by John E. Graham and Sons, which were performed by Landry with considerable frequency, militate against our finding Landry to be primarily a longshoreman or harbor worker, rather than a Jones Act seaman.

The test for determining whether or not one is a Jones Act seaman as used by the United States Fifth Circuit is as follows:

> (1) Is the person injured more or less permanently attached to a vessel or a fleet of vessels?
>
> (2) Did the capacity in which the person was employed contribute to the function of the vessel or to the accomplishment of its mission?

Under the holding of the Fifth Circuit in *Fazio v. Lykes Bros. S.S. Co., Inc.*, 567 F.2d 301 (5th Cir. 1978), to be a seaman one must have a more or less permanent

connection with a vessel or a fleet of vessels. As *Fazio* properly notes, the larger the fleet, the more tenuous the connection. The Fifth Circuit further notes in *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *U.S. cert. denied,* 104 S.Ct. 974, 464 U.S. 1069, 79 L.Ed.2d 212 (1984), although it was formerly a requirement that a fleet of vessels have common ownership or control if one seeks seaman status under a fleet of vessels concept, common ownership or control is no longer required, as the scope of Jones Act coverage as found by the courts is gradually expanding. However, a somewhat narrower view is found in *Bouvier v. Krenz,* 702 F.2d 89 (5th Cir. 1983), in its statement that work aboard a fleet of vessels must not be spasmotic and the relationship between the individual and the ship must be substantial in point of time and work.

Landry meets all these tests. He worked on vessels on an average of five hours a day. All the ships on which he worked were owned or chartered by John E. Grahan and Sons, were operated by the company and were painted the same colors. His work onboard the vessels was not merely spasmotic. Landry's work as set forth was clearly necessary to the mission and purpose of these vessels, which was to engage in navigation for petroleum companies in inland waterways and offshore. There can be no question that Landry was an experienced seaman and that an essential part of his duties was to pilot the vessels for various purposes, the traditional work of a seaman. The fact that Landry was also required to perform work which in many cases is performed by shore based workers, (transporting supplies, minor repairs and maintenance supervision) does not detract from the fact that only a qualified seaman

could have performed all of the duties of his job. Since the uncontradicted evidence demonstrates that Landry performed a substantial part of his work onboard an identifiable fleet of vessels, and since an essential part of that work was that of a seaman, we find no error in the decision of the trial court granting partial summary judgment decreeing Landry a seaman for the purposes of the Jones Act.

Accordingly, the judgment of the trial court is affirmed, all costs to await final disposition of the matter.

AFFIRMED.

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

NO. CA/87/0372

JERRY A. LANDRY, ET AL

VERSUS PARISH OF ST. MARY

JOHN E. GRAHAM & SONS, ET AL

On Application For Rehearing.
Rehearing granted.

The rehearing is limited to the issue of the appropriateness of summary judgment on the question of seaman's status. No oral argument will be required.

The briefs of counsel should be filed with this court no later than August 1, 1988. Counsel in briefs are asked to respond to the following:

1. Did the trial court's summary judgment declaring plaintiff a seaman grant plaintiff "part of the relief for which he has prayed" as set forth in LSA-C.C.P. art. 966?

2. Is there any doubt that an appeal does not lie from the trial court's refusal to grant defendant's motion for summary judgment? LSA-C.C.P. art. 968.

/s/ J. Louis Watkins, Jr.
J. LOUIS WATKINS, JR.

/s/ Burrell J. Carter
BURRELL J. CARTER

/s/ Frank Foil
FRANK FOIL

Judges

Filed Jul 18 1988

/s/ Stanley Lemoine
STANLEY LEMOINE, Clerk

JERRY A. LANDRY
AND HIS WIFE,
ELIZABETH HEBERT LANDRY

VERSUS

JOHN E. GRAHAM & SONS,
INC. AND MIDLAND
INSURANCE COMPANY

COURT OF
APPEAL

FIRST CIRCUIT

STATE OF
LOUISIANA

NO. 87 CA 0372

ON REHEARING

(Filed Sept. 6, 1988)

BEFORE: WATKINS, CARTER AND FOIL, JJ.
PER CURIAM.

We granted a rehearing in this case to consider the appropriateness of using a motion for summary judgment to determine the issue of seaman's status under the Jones Act, 46 U.S.C.A. 688. In the original hearing, we affirmed the trial court's granting of partial summary judgment, finding the plaintiff to be a seaman. Upon reflection, we find the granting of summary judgment inappropriate under these circumstances.

LSA-C.C.P. art. 1915 reads as follows:

Partial judgment

A. A final judgment may be rendered and signed by the court, even though it may not grant the successful party all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:

(1) Dismisses the suit as to less than all of the plaintiffs, defendants, third party plaintiffs, third party defendants, or intervenors.

(2) Grants a motion for judgment on the pleadings, as provided by Articles 965, 968, and 969.

(3) Grants a motion for summary judgment, as provided by Articles 966 through 969.

(4) Signs a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by Article 1038.

(5) Signs a judgment on the issue of liability when that issue has been tried separately by the court, or when, in a jury trial, the issue of liability has been tried before a jury and the issue of damages is to be tried before a different jury.

B. If an appeal is taken from such a judgment, the trial court nevertheless shall retain jurisdiction to adjudicate the remaining issues in the case.

LSA-C.C.P. art. 966 A provides in part that:

> The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor *for all or part of the relief for which he has prayed.* (Emphasis added)

It is clear from a reading of these articles, as well as the jurisprudence interpreting them, that summary judgment may be granted for less than all of the relief for which the party prays. However, it is essential to the validity of a summary judgment that at least some of the relief prayed for by one of the parties is granted. LSA-C.C.P. arts. 1915, 966. *Dryades Sav. and Loan Ass'n v. Lassiter,* 400 So.2d 894 (La. 1981). See also *Strauss v. Rivers,* 501 So.2d 876 (La. App. 5th Cir. 1987); *Pizzolato v. Field,* 441 So.2d 1248 (La. App. 1st Cir. 1983); *Beard v. Assumption Parish Police Jury,* 413 So.2d 923 (La. App. 1st Cir. 1982), *writ denied,* 420 So.2d 444 (La. 1982); *Smith v. Hanover Insurance Co.,* 363 So.2d 719 (La. App. 2d Cir. 1978).

Plaintiff's original petition requested monetary damages for injuries caused by the negligence of the defendant, John E. Graham and Sons, Inc., under the Jones Act and by the unseaworthiness of the vessel under the General Maritime Law.

The plaintiff's motion for partial summary judgment requested that there be judgment declaring the plaintiff to be a seaman. It did not ask the court to find the defendant negligent under the Jones Act or to declare the vessel unseaworthy under the General Maritime Law. Consequently, the summary judgment granted by the trial court declared only that the plaintiff was a seaman as a matter of law.[1]

Although the finding of seaman's status under the Jones Act is an essential part of the plaintiff's cause of action, it does not in itself grant any relief for which the plaintiff prayed. Hence, we conclude that the summary judgment neither granted nor denied any of the relief, in whole or in part, claimed by the moving party and was thus unauthorized by our code of civil procedure.

We expressly note that summary judgments have been held appropriate when summary judgment was rendered classifying the employee as a statutory employee of a defendant and *dismissing* the plaintiff's tort suit against the employer. *Sandifer v. Crown Zellerbach Corporation,* 470 So.2d 483 (La. App. 1st Cir. 1985), *writ denied* 475 So.2d 357 (La. 1985). See also *Thelma Notoriano v. Rebecca Anthony,* — So.2d — (La. App. 1st Cir. 1988) (docket no. CA 88 0260, decided June 21, 1988); *Cantrell v. BASF Wyandotte,* 506 So.2d 793 (La. App. 1st Cir. 1987), *writs denied* 512 So.2d 1178 and 514 So.2d 120 (La. 1987).

However, summary judgment would not be available to a plaintiff-employee to have declared that he was not a statutory employee in a tort suit or was a seaman in a maritime personal injury case since this would result in piecemeal litigation of issues which would neither grant nor deny the relief prayed for.[2]

We therefore vacate our original judgment. The summary judgment in favor of plaintiff is reversed, and the case is remanded to the district court for further proceedings, in accordance with the views expressed herein. All costs to await final disposition of this matter.

JUDGMENT VACATED, AND REMANDED.

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[1]We note that a defendant's motion for summary judgment on the issue of seaman's status is appropriate and, if granted, would in effect dismiss the plaintiff's cause of action under the Jones Act. See *Beard v. Assumption Parish Police Jury*, 413 So.2d 923 (La. App. 1st Cir. 1982), *writ denied*, 420 So.2d 444 (La. 1982) and *Alexander v. Hudson Engineering, Inc.*, 378 So.2d 156 (La. App. 1st Cir. 1979).

[2]We note that under the Federal Rules of Civil Procedure (FRCP), Rule 56, a court may grant a partial summary judgment on the issue of seaman's status, however, the judgment is considered interlocutory and therefore unappealable. FRCP 54(b) and 56(d). Unlike their federal counterpart, LSA-C.C.P. arts. 966 and 968 provide that judgments granting motions for summary judgments are final appealable judgments and interlocutory judgments are not permitted. See LSA-C.C.P. art. 968, comment (b). Although the federal and state rules differ in their approach to permissible issues for summary judgment, the same under lying rationale applies to each, that being, the avoidance of piecemeal litigation and piecemeal appeals. See Comments to FRCP 54 and 56. See also *Dryades v. Sav. and Loan Ass'n v. Lassiter*, 400 So.2d 894 (La. 1981) and *Smith v. Hanover Insurance Co.*, 363 So.2d 719 (La. App. 2nd Cir. 1978).

THE SUPREME COURT OF
THE STATE OF LOUISIANA

JERRY A. LANDRY and
ELIZABETH HEBERT LANDRY

VS. NO. 88-C-2496

JOHN E. GRAHAM & SONS, INC. AND
MIDLAND INSURANCE COMPANY

IN RE: John E. Graham & Sons Inc.; Grahams, John E. & Sons Inc.; Highland Insurance Co.; Americas Insurance Co.; Citadel Insurance Co.; Certain Undwrts. Lloyds London; Institute Companies;—Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA87 0372; Parish of St. Mary 16th Judicial District Court Div. "A" Number 75,716

November 28, 1988

Denied.

JAD
PFC
WFM
JLD
JCW
HTL
LFC

Supreme Court of Louisiana
November 28, 1988

/s/ (Illegible)
Deputy Clerk of Court
For the Court